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DA 10-1746

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## DOMESTIC SECTION 214 AUTHORIZATION GRANTED

### Domestic Section 214 Application Filed for the Transfer of Control of Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc., Debtors-In-Possession.

WC Docket No. 10-41

#### By the Chief, Wireline Competition Bureau:

Pursuant to section 214 of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 214, and sections 0.91, 0.291, and 63.03 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 63.03, the Wireline Competition Bureau (Bureau) approves the application of Hawaiian Telcom, Inc. (HTI) and Hawaiian Telcom Services Company, Inc. (HT Services) (together, Applicants), both debtors-in-possession before the United States Bankruptcy Court (Court), requesting approval for various assignments and transfers of control of licenses and authorizations.<sup>1</sup> The Bureau has determined that grant of this application serves the public interest,<sup>2</sup> and accordingly the application is granted pursuant to the Commission's procedures for domestic section 214 transfer of control applications.<sup>3</sup>

On March 10, 2010, the Commission released a public notice accepting the application for non-streamlined processing. On May 5, 2010, the Department of Justice, including the Federal Bureau of Investigation, with the concurrence of the Department of Homeland Security (collectively, the Executive Branch Agencies), filed a letter requesting that the Commission defer action on this application while

<sup>1</sup> Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc. (Debtors-in-Possession), Application for Consent to Transfer Control of Domestic Authorizations Under Section 214 of the Communications Act, as Amended, WC Docket No. 10-41 (filed Jan. 25, 2010) (Application); *Applications Filed for the Transfer of Control of Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc., Debtors-in-Possession*, WC Docket No. 10-41, Public Notice, DA 10-409 (rel. March 10, 2010); *Pleading Cycle Extended on Applications for Transfer of Control of Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc., Debtors-In-Possession*, WC Docket No. 10-41, Public Notice, DA 10-569 (rel. Mar. 30, 2010). Time Warner Cable (TWC) filed an opposition to the applications on March 24, 2010. Applicants filed a reply to the opposition on April 7, 2010, and TWC subsequently filed a letter on May 4, 2010, responding to Applicants' reply.

<sup>2</sup> *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, CC Docket No. 01-150, Report and Order, 17 FCC Rcd 5517, 5529, para. 22 (2002).

<sup>3</sup> 47 C.F.R. § 63.03.

they reviewed potential national security, law enforcement, and public safety issues.<sup>4</sup> Consistent with Commission precedent, the Wireline Competition Bureau deferred action on the application in response to the Executive Branch Agencies' request.<sup>5</sup> On September 3, 2010, the Executive Branch Agencies withdrew their requests to defer action, stating that they have no objection to the applications.<sup>6</sup>

TWC opposes grant of the application, arguing that, unless the Bureau were to impose conditions, approval of the transaction would result in anticompetitive conduct by Applicants.<sup>7</sup> Specifically, TWC contends that the Applicants have "consistently failed to comply with [their] statutory obligations ... to provide access to the poles, conduits, and rights-of-way that [they] control[] in a reasonable and nondiscriminatory basis,"<sup>8</sup> and that, once they have emerged from bankruptcy and their financial position is strengthened, Applicants' "capacity to restrain competitors like TWC by denying access to essential pole and conduit resources" would be strengthened as well.<sup>9</sup>

The Applicants deny that they have violated our pole attachment rules, arguing that TWC's complaints are "spurious claims" that are not related to the proposed transaction and should not be resolved in this proceeding.<sup>10</sup> Applicants cite to prior Commission holdings that allegations of Act or Commission rule violations "are more appropriately addressed via the Commission's complaint process," and are ill-suited for resolution in a transfer-of-control proceeding.<sup>11</sup> Applicants note that TWC fails to cite any specific instance in which Applicants have allegedly violated our rules, or to provide a sworn statement supporting its allegations.<sup>12</sup> Finally, Applicants claim that TWC stands to benefit the longer Applicants remain under the jurisdiction of the bankruptcy court, and urge the Commission to approve the transfer of control promptly so that they may emerge from bankruptcy "and become stronger and better service providers."<sup>13</sup>

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<sup>4</sup> Letter from Siobhan E. Dupuy, U.S. Department of Justice, to Marlene H. Dortch, FCC, WC Docket No. 10-41 (filed May 5, 2010).

<sup>5</sup> The Commission considers national security, law enforcement, foreign policy, and trade policy concerns when analyzing a transfer of control or assignment application in which foreign ownership is an issue. See *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Satellites Providing Domestic and International Service in the United States*, Report and Order, 12 FCC Rcd 24094, 24170-72, paras. 178-82 (1997); *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23919-21, paras. 61-66 (1997) ("*Foreign Participation Order*"), Order on Reconsideration, 15 FCC Rcd 18158 (2000). In assessing the public interest, the Commission considers the record and accords the appropriate level of deference to Executive Branch expertise on national security and law enforcement issues. See *Foreign Participation Order*, 12 FCC Rcd at 23919-21, paras. 61-66.

<sup>6</sup> Letter from Siobhan E. Dupuy, U.S. Department of Justice, to Marlene H. Dortch, FCC, WC Docket No. 10-41 (filed Sept. 3, 2010).

<sup>7</sup> See Comments in Opposition of Time Warner Cable, WC Docket No. 10-41 (filed Mar. 24, 2010) (TWC Opposition).

<sup>8</sup> TWC Opposition at 1.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> Applicants' Reply at 3.

<sup>11</sup> *Id.* at 3-4.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.* at 1.

After careful consideration of the record in this proceeding, we conclude that the concerns raised by TWC are not sufficient to justify denial of the merger application or to impose conditions on the terms of the transfer. As an initial matter, we note that facilitating the successful resolution of a bankruptcy proceeding is a factor in our public interest analysis.<sup>14</sup> It is the Commission's policy to support the bankruptcy laws and, where possible, to accommodate them in a manner that is consistent with the Act.<sup>15</sup>

The Commission has stated that facilitating a telecommunications service provider's successful emergence from bankruptcy "advances the public interest by providing economic and social benefits, especially the compensation of innocent creditors."<sup>16</sup> Here, we find that the transaction is likely to result in certain public interest benefits, including allowing Applicants to focus on providing services and investing in facilities, and making them stronger competitors better able to offer new products and services.<sup>17</sup>

Furthermore, we agree with the Applicants that the concerns expressed by TWC are more appropriately resolved in an Enforcement Bureau complaint proceeding. The Commission generally will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction at issue.<sup>18</sup> Where competitors have raised allegations concerning past discriminatory conduct by parties to a transaction with respect to pole attachments, access to remote terminals, and unbundled loop requests, and asserted that they are likely to perpetuate the alleged anticompetitive behavior absent conditions, the Commission has been clear that those issues are more appropriately addressed in other proceedings.<sup>19</sup> Finally, we find that TWC's concerns that the Applicants will engage in further anticompetitive behavior after consummation is speculative and is not supported by evidence in the record. We are thus satisfied that the proposed transaction is in the public interest and should be granted.

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<sup>14</sup> *WorldCom, Inc. and its Subsidiaries (debtor-in possession), Transferor, and MCI, Inc., Transferee*, WC Docket No. 02-215, Memorandum Opinion and Order, 18 FCC Rcd 26484, 26503, para. 29 (2003) (*WorldCom Order*).

<sup>15</sup> *Id.*; see also *Application of Orbital Communications Corp. and ORBCOMM Global, L.P., Assignors, and ORBCOMM License Corp. and ORBCOMM LLC, Assignees*, 17 FCC Rcd 4496, 4504, para. 15 (2002) ("Because this transaction permits the [licensee] to emerge from bankruptcy and continue operations, the competitive impact will be beneficial .... Successful emergence from bankruptcy is critical to the continued operation and expansion of the ORBCOMM system.").

<sup>16</sup> *WorldCom Order*, 18 FCC Rcd at 26503, para. 29.

<sup>17</sup> Application at 12.

<sup>18</sup> See *Applications of AT&T Inc. and Centennial Communications Corp.*, WT Docket No. 08-246, Memorandum Opinion and Order, 24 FCC Rcd 13915, 13929, 13974-74, paras. 30 and 150 (2009) (citing *Applications of Celco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, WT Docket No. 08-95, Memorandum Opinion & Order and Declaratory Ruling, 23 FCC Rcd 17444, 17463 at ¶ 29 (2008); *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, Memorandum Opinion & Order, 23 FCC Rcd 17570, 17582 at ¶ 22 (2008); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 04-70, Memorandum Opinion & Order, 19 FCC Rcd 21522, 21546 at ¶ 43 (2004)).

<sup>19</sup> See *Applications Filed By Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, WC Docket No. 09-95, Memorandum Opinion and Order, FCC 10-87, n.121 (rel. May 10, 2010) (stating that, in the absence of any basis for concluding that Frontier is likely to engage in anti-competitive behavior post-merger, pole attachment and other issues are more appropriately addressed in enforcement proceedings or rulemakings of general applicability).

The Bureau finds, upon consideration of the record, that the proposed transfer will serve the public interest, convenience, and necessity, and therefore grants the requested authorization. Pursuant to section 1.103 of the Commission's rules, 47 C.F.R. § 1.103, the consent granted herein is effective upon the release of this Public Notice. Petitions for reconsideration under section 1.106 or applications for review under section 1.115 of the Commission's rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of the date of this Public Notice.

For further information, please contact Alex Johns, (202) 418-1167, Competition Policy Division, Wireline Competition Bureau; Jeff Tobias, Mobility Division, Wireless Telecommunications Bureau, at (202) 418-1617; or David Krech, Policy Division, International Bureau, at (202) 418-7443.

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